No. 99-632

In the Supreme Court of the United States

GORDON M. BROWNE AND EDITH C. BROWNE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

LORETTA C. ARGRETT
Assistant Attorney General

GILBERT S. ROTHENBERG
MICHELLE B. O'CONNOR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the imposition of federal income taxes, penalties and interest on petitioners violates the Free Exercise Clause of the First Amendment to the United States Constitution or the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is reported at 176 F.3d 25. The opinion of the district court (Pet. App. 4-12) is reported at 22 F. Supp.2d 309.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1999. The petition for rehearing was denied on July 12, 1999 (Pet. App. 15a). The petition for a writ of certiorari was timely filed on Tuesday, October 12, 1999 (following a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are members of the Religious Society of Friends, commonly known as the Quakers, who sincerely believe that participation in war is contrary to God's will (Pet. App. 97a-98a). Petitioners also believe that a "voluntary" payment of taxes—one made without the compulsion of a levy or court order—is against the will of God to the extent that such taxes are used to fund participation in war by others (*id.* at 98a). Although petitioners timely filed joint federal income tax returns for the years 1993, 1994, and 1995, they paid only approximately 72% of the taxes shown due on those returns (*id.* at 98a-100a, 110a-115a). They did not pay the remaining amount, which they calculated to represent the portion of their taxes that would be used by the government to fund the military (*ibid*). Petitioners attached a letter to their returns which explained their reason for not paying their taxes in full and which stated that the portion of their taxes not paid to the United States would be sent instead to "non-governmental life-sustaining and life supporting organizations" (*ibid*).

2. The United States collected petitioners' unpaid taxes for each of these years by levying on their accounts (Pet. App. 6a, 99a-100a). The government also collected interest on the unpaid taxes and statutory additions to tax for failure to timely pay taxes (26 U.S.C. 6651) (1994 & Supp. III 1997) and for underpayment of estimated taxes (26 U.S.C. 6654) (1994 & Supp. III 1997). After petitioners' claim for refund of the interest and additions to tax was denied, petitioners

commenced this refund suit in federal district court (Pet. App. 6a, 96a, 99a-104a).[1]

Petitioners did not dispute their liability for the taxes collected by the government. They contended, however, that the government's refusal to grant them an exemption from interest and additions to tax constituted an impermissible discrimination against their religious beliefs under the Free Exercise Clause of the First Amendment (Pet. App. 103a-104a). Petitioners further asserted that a requirement that they voluntarily pay their taxes or be liable for interest and penalties for a failure to do so violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* Petitioners claimed that a less intrusive means of furthering the government's compelling interest in collecting taxes would be to levy upon their assets immediately upon assessment of the taxes and thereby minimize the accrual of interest and penalties on unpaid taxes (Pet. App. 105a-106a).[2]

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[1] Because the Tax Court has exclusive jurisdiction over claims for abatement of interest (see 26 U.S.C. 6404(i)), the district court lacked jurisdiction over that claim in this case. The court of appeals did not rule on that jurisdictional issue, however, electing instead to affirm the judgment of the district court on the ground that petitioners' complaint failed to state a claim upon which relief could be granted (Pet. App. 2a-3a).

[2] Petitioners sought a declaratory judgment and an injunction requiring the Internal Revenue Service "to alter its practices to comport with the Constitution, RFRA and their own regulations and provide equal access to the system of exemptions for persons whose hardship stems from religious faith" (Pet. App. 106a). The district court lacked jurisdiction over these claims for declaratory and injunctive relief. See 26 U.S.C. 7421; 28 U.S.C. 2201; *California* v. *Grace Brethren Church*, 457 U.S. 393, 408 (1982). Neither the district court nor the court of appeals addressed these jurisdictional issues (Pet. App. 2a-3a).

3. The district court granted judgment on the pleadings to the United States (Pet. App. 4-12). The court rejected petitioners' First Amendment claims, noting that "courts consistently have upheld the constitutionality of the federal tax laws when considering objections similar to those raised by [petitioners]" (*id.* at 7). The court also held that petitioners were not entitled to relief under RFRA, for "the Supreme Court has established that uniform, mandatory participation in the Federal income tax system, irrespective of religious belief, is a compelling governmental interest" (*id.* at 11, quoting *Adams* v. *Commissioner*, 110 T.C. 137, 139 (1998), aff'd, 170 F.3d 173 (3d Cir. 1999)). The court rejected petitioners' suggestion that the government could realize its compelling interest through a means less burdensome on their religious rights for, as this Court has held, "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs" (Pet. App. 7, quoting *United States* v. *Lee*, 455 U.S. 252, 260 (1982)).

4. The court of appeals affirmed (Pet. App. 1-3). The court held that the Free Exercise Clause does not afford petitioners a basis for refusing to comply with the tax laws and does not entitle them "to force the IRS to levy the taxes due at additional time and expense" (*id.* at 2-3). The court also rejected petitioners' claim under RFRA, holding that "voluntary compliance is the least restrictive means by which the IRS furthers the compelling governmental interest in uniform, mandatory participation in the federal income tax system" (*id.* at 3, quoting *Adams* v. *Commissioner*, 170 F.3d 173, 176 (3d Cir. 1999)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. Under Section 6651(a) of the Internal Revenue Code, if a taxpayer fails to pay his tax by the due date, a statutory penalty "shall be added to the amount shown as tax on such return" "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." 26 U.S.C. 6651(a)(2); see also 26 U.S.C. 6651(b)(2). This penalty is mandatory and must be imposed unless the taxpayer demonstrates a reasonable cause for failing timely to pay his taxes and the absence of any willful neglect of his obligations. See, *e.g.*, *United States* v. *Boyle*, 469 U.S. 241, 245-246 (1985); *In re Carlson*, 126 F.3d 915, 921 (7th Cir. 1997), cert. denied, 118 S. Ct. 1388 (1998); *Estate of Geraci* v. *Commissioner*, 502 F.2d 1148, 1149-1150 (6th Cir. 1974), cert. denied, 420 U.S. 992 (1975).

Under Section 6654(a) of the Code, a statutory penalty is added to the tax if there is an underpayment or nonpayment of estimated taxes when due. 26 U.S.C. 6654(a). Section 6654(e)(3)(A) specifies that this penalty shall not apply if "the Secretary determines that by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience." 26 U.S.C. 6654(e)(3)(A). Although there is no explicit "reasonable-cause" exception to this penalty, some courts have held that a showing of reasonable cause and a lack of willful neglect is sufficient to warrant abatement of a penalty under this Section. See *Webster* v. *United States*, 375 F.2d 814, 822 (Ct. Cl. 1967); *McIntyre* v.

Commissioner, 272 F.2d 188, 189 (6th Cir. 1959). In the absence of a showing of reasonable cause or some higher level of excuse, imposition of this penalty is mandatory. *Horowitz* v. *Commissioner*, 69 T.C.M. (CCH) 2558, 2561 (1995), aff'd, 139 F.3d 889 (4th Cir. 1998).

Under the applicable Treasury regulations, a "failure to pay [taxes] will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either *unable to pay the tax* or would suffer an undue hardship * * * if he paid on the due date." 26 C.F.R. § 301.6651-1(c)(1) (emphasis added). Circumstances that constitute reasonable cause "[g]enerally * * * arise as a result of factors beyond a taxpayer's power to control." *McMahan* v. *Commissioner*, 114 F.3d 366, 369 (2d Cir. 1997).

b. Petitioners failed to establish reasonable cause for their failure to timely pay their taxes and estimated taxes for the years at issue. Their complaint did not allege that they exercised ordinary business care, that they were unable to pay the taxes, or that undue financial hardship would result from timely paying the taxes in question. Instead, the allegations in the complaint demonstrated that petitioners' failure timely to pay their taxes was due to their determination that "[t]heir religious beliefs compelled them to withhold the portion of their tax moneys equivalent to the money the government was allocating to the Department of Defense" (Pet. App. 98a). Petitioners admitted that they were financially able to pay their taxes—instead of paying the taxes due, they elected to pay the same amount to organizations that, in their view, were "bene-

ficent" (*id.* at 98a-99a). A decision not to pay taxes that is based on a religious or other belief is not "[a] factor[] beyond the taxpayer's power to control" that constitutes a "reasonable cause" that excuses the imposition of tax penalties. *McMahan* v. *Commissioner*, 114 F.3d at 369.

Even apart from the absence of "reasonable cause" for their failure to pay, petitioners were ineligible for a waiver of penalties because their "conscious, intentional failure" (*United States* v. *Boyle*, 469 U.S. at 245) to comply with the tax laws constituted a willful neglect of their statutory obligations. See *Lefcourt* v. *United States*, 125 F.3d 79, 84 (2d Cir. 1997), cert. denied, 118 S. Ct. 2341 (1998).

c. Petitioners err in contending that, because the Treasury Department has granted waivers of penalties for circumstances such as "destruction of a taxpayer's residence by fire or civil disturbance, serious illness, or unavoidable absence," the agency may not refuse to extend a waiver for "religious hardship" without a compelling reason (Pet. 11-13). Petitioners incorrectly rely on this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), as support for their contention. That decision in fact makes clear that the Free Exercise Clause does *not* require the United States to grant an exemption for religious hardship when, as here, waivers are granted on the basis of facially neutral, uniformly applicable standards that do not take into account religious or other beliefs. *Id.* at 883-884; see also *Sherbert* v. *Verner*, 374 U.S. 398, 401-403 (1963); *Bowen* v. *Roy*, 476 U.S. 693, 699-701 (1986). Unlike the unemployment compensation cases (such as *Bowen* and *Sherbert*) which involved a governmental determination of the employee's subjective motivation for declining to work, the Internal Revenue Service is

not permitted to inquire into an individual's subjective motivation for failing to pay taxes. Waiver of tax penalties is permitted only upon the occurrence of specific circumstances beyond the individual's control that render him unable to pay his taxes. See page 5, *supra*. This facially neutral standard does not discriminate among taxpayers based upon their religious or nonreligious beliefs. Moreover, statutes that contain only a few, isolated, and extraordinary exceptions to a general rule are not subject to the reasoning of decisions such as *Bowen* and *Sherbert*, which applies only to statutory schemes that, either on their face or in application, significantly and consistently turn upon individualized, case-by-case decisionmaking. The recognition in the Internal Revenue Code of a small number of exceptions to penalties for circumstances wholly beyond the control of the taxpayer does not open the door to across-the-board individualized decisionmaking that factors in circumstances entirely within the control and election of the taxpayer.

2. a. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, creates a statutory right of free exercise that employs the "compelling interest" test applied in cases arising under the Free Exercise Clause prior to this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Under this statute, when a governmental action substantially burdens a religious belief, the government must demonstrate that the challenged action (i) furthers a compelling governmental interest and (ii) represents the least restrictive means of furthering that interest. 42 U.S.C. 2000bb-1.

In *Smith*, the Court held that the Free Exercise Clause permitted a State to deny unemployment benefits to persons dismissed from their jobs based on the

religious use of peyote, a drug whose use was generally prohibited under the State's criminal laws. The Court held that the generally applicable, facially neutral criminal law banning the use of peyote did not implicate the Free Exercise Clause. In so holding, the Court rejected the argument that the Free Exercise Clause required the State to demonstrate a compelling interest for denying an exemption for the religious use of peyote. The Court held that the compelling interest test was inapplicable to "an across-the-board prohibition on a particular form of conduct." 494 U.S. at 884.

RFRA makes the compelling interest test enunciated under pre-*Smith* precedent applicable to all governmental action that imposes a "substantial burden" on the free exercise of religion. 42 U.S.C. 2000bb-1(a). The legislative history of the Act explains that courts "should look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened and the least restrictive means has been employed in furthering a compelling governmental interest." H.R. Rep. No. 88, 103rd Cong., 1st Sess. 6-7 (1993). In adopting this standard, Congress did not intend to "approve[] nor disapprove[] of the result in any particular court decision involving the free exercise of religion." *Ibid.* Instead, Congress sought only to restore "the legal standard that was applied in" pre-*Smith* decisions. *Ibid.* Accord, S. Rep. No. 111, 103rd Cong., 1st Sess. 9 (1993).[3]

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[3] In *City of Boerne* v. *Flores*, 521 U.S. 507, 512, 522 (1997), the Court held that Congress lacked authority under Section 5 of the Fourteenth Amendment to impose RFRA upon state and local governments. The United States conceded in the courts below that RFRA remains applicable to the federal government after *Flores*. See *In re Young*, 141 F.3d 854 (8th Cir. 1997) (upholding

b. It was well settled under the cases that preceded *Smith* that neutral, generally applicable tax laws satisfy the compelling interest test. See, *e.g.*, *Hernandez* v. *Commissioner*, 490 U.S. 680 (1989); *United States* v. *Lee*, 455 U.S. 252, 257-258 (1982); H.R. Rep. No. 88, *supra*, at 5 n.13. The courts of appeals have consistently reached that same conclusion under RFRA. See *Adams* v. Commissioner, 130 F.3d 173 (3d Cir. 1999); Droz v. *Commissioner*, 48 F.3d 1120, 1122-1123 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996); *Packard* v. *United States*, 7 F. Supp.2d 143, 147 (D. Conn. 1998), aff'd, 99-2 U.S. Tax Rep. (RIA) ¶ 50,630 (2d Cir. 999) (voluntary compliance with tax laws represents least restrictive means of furthering compelling governmental interest). Accord, *Steckler* v. *United States*, 98-1 U.S. Tax Rep. (RIA) ¶ 50,219 (E.D. La. 1998)). As this Court emphasized in *United States* v. *Lee*, 455 U.S. at 260, compliance by all taxpayers with the tax laws is the *only* means—and thus necessarily the least restrictive means—of furthering the government's compelling interest:

> The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. * * * Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with

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the constitutionality of RFRA as applied to the federal government), cert. denied, 119 S. Ct. 43 (1998); *EEOC* v. *Catholic University*, 83 F.3d 455 (D.C. Cir. 1996) (applying RFRA to the federal government prior to *Flores*). But see *In re Gates Community Chapel of Rochester, Inc.*, 212 B.R. 220, 225-226 (Bankr. W.D.N.Y. 1997) (interpreting *Flores* as holding that RFRA is unconstitutional as to both state and federal governments).

> the payment of taxes affords no basis for resisting the tax.

Ibid. See also *Hernandez* v. *Commissioner*, 490 U.S. at 700.

c. It was also well settled under pre-*Smith* precedent that the Free Exercise Clause does not bar the imposition of penalties on taxpayers who fail to comply with the tax laws based on religious objections. Penalties further the compelling interest in protecting the integrity of the tax system by compensating the government for the lost use of revenues and by providing an incentive for taxpayers to comply. *United States* v. *Nelson*, 796 F.2d 164, 168 (6th Cir. 1986) (penalties are "part of the total tax system and exist[] to protect the administration of the system"); *Autenrieth* v. *Cullen*, 418 F.2d 586, 588-589 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970). Courts have therefore consistently upheld the imposition of civil penalties on taxpayers who refuse to comply with the Internal Revenue Code based upon their religious objections. See, *e.g.*, *Adams* v. *Commissioner*, 170 F.3d 173 (3d Cir. 1999); *Lull* v. *Commissioner*, 602 F.2d 1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); *Babcock* v. *Commissioner*, 51 T.C.M. (CCH) 931 (1986); *United States* v. *Haworth*, 386 F. Supp. 1099 (S.D.N.Y. 1974).

Petitioners err in contending (Pet. 14-17) that the decision in this case creates a conflict with the holdings of other courts of appeals. As the above-cited cases reflect, every court that has considered the application of RFRA to the federal income tax laws has concluded that voluntary compliance with the tax laws is the least restrictive means of furthering the government's compelling interest in collecting taxes. See also *Branch Ministries, Inc.* v. *Rossotti*, 40 F. Supp.2d 15 (D.D.C.

1999). As this Court has long emphasized, "the tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *United States* v. *Lee*, 455 U.S. at 260.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
GILBERT S. ROTHENBERG
MICHELLE B. O'CONNOR
Attorneys

DECEMBER 1999

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[4] The cases that petitioners cite for the general proposition that the government should seek alternatives that impose less burdensome restrictions on religious freedom (Pet. 14-15) do not involve federal taxes. They instead involve wholly unrelated statutory schemes and create no conflict with the decision of the court of appeals in this case. See, *e.g.*, *Craddick* v. *Duckworth*, 113 F.3d 83 (7th Cir. 1997) (State required to demonstrate that regulation permitting limited wearing of medicine bag by prisoner was least restrictive means of furthering its interest in security); *Small v. Lehman*, 98 F.3d 762 (3d Cir. 1996) (district court erred in applying summary judgment standard in determining whether prisoners' free-exercise rights were substantially burdened by State's refusal to provide separate worship facilities); *Cheema* v. *Thompson*, 67 F.3d 883 (9th Cir. 1995) (State required to demonstrate that prohibiting student from wearing ceremonial knife to school was least restrictive means of furthering State's interest in safety).